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Issue Date: 26 April 2005

CASE NO.: 2004-LHC-2146

OWCP NO.: 07-157936

IN THE MATTER OF

**WOODROW BECK,
Claimant**

v.

**FRIEDE GOLDMAN OFFSHORE,
Employer**

and

**ZURICH AMERICAN INSURANCE CO.,
Carrier**

APPEARANCES:

**Billy Wright Hilleren, Esq.
On behalf of Claimant**

**Patrick E. O'Keefe, Esq.
Nick B. Roberts, Jr., Esq.
On behalf of Employer**

**BEFORE: C. RICHARD AVERY
Administrative Law Judge**

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq., (The Act), brought by Woodrow Beck (Claimant) against Friede Goldman Offshore (Employer), and Zurich American Insurance Company (Carrier). The formal hearing was conducted in Gulfport, Mississippi on January 14, 2005. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.¹ The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-25, and Employer's Exhibits 1-4.² This decision is based on the entire record.³

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. The date of the injury/accident was September 25, 2000;
2. The injury was in the course and scope of employment;
3. An employer/employee relationship existed at the time of the accident;
4. Employer was advised of the injury on September 25, 2000;
5. A Notice of Controversion was filed on November 4, 2000;
6. An informal conference was held on May 18, 2004;
7. Average weekly wage at the time of injury was \$742.45;
8. Nature and extent of disability:
 - (a) Temporary total disability: From September 26, 2000 to disputed;

¹The parties were granted time post hearing to file briefs. This time was extended up to and through March 28, 2005.

² Employer's Exhibit 5, employment positions located in the Mobile Register newspaper the date of the hearing, was not admitted. Employer does not meet its burden of demonstrating the availability of suitable alternative employment by introducing classified ads, as there is "no evidence of the precise nature, terms and availability of the positions listed." *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989).

³ The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr. ____"; Joint Exhibit- "JX ___, pg.____"; Employer's Exhibit- "EX ___, pg.____"; and Claimant's Exhibit- "CX ___, pg.____".

- (b) Benefits paid:
 - Total temporary disability: \$88,189.51 from September 26, 2000 to February 20, 2004;
 - Permanent partial disability: From February 21, 2004 to present at the rate of \$494.97 per week;
- (c) Medical benefits have been paid;
- 9. Permanent disability is admitted: 30% right lower extremity or 12% whole person; and
- 10. The date of maximum medical improvement was May 23, 2003.

Issues

The unresolved issues in this proceeding are:

- 1. Extent of disability;
- 2. Whether suitable alternative employment was identified;
- 3. Penalties;
- 4. Interest; and
- 5. Attorney fees and expenses.

Statement of the Evidence

Testimony of Woodrow Beck

Claimant is fifty years old and lives in Mobile, Alabama. He completed the ninth grade at vocational school in Pensacola, Florida, but dropped out of school in the tenth grade when he was placed in a special education high school class. Claimant testified that he had poor grades in school and does not read well. He does not understand what he reads, he can only understand if someone reads aloud to him. Claimant's thirty-six year old daughter reads him his mail. He cannot complete forms and applications, rather his children must assist him.

Claimant left school and briefly entered the Job Corps where he learned some brick masonry, and then joined the Navy for two years. He then worked at Ingalls Shipyard as a painter for a year and a half. Claimant thereafter moved to Chicago where he worked a manufacturing job as a utility operator and machine operator. He performed more painting, and then worked for Bernard Welding for twelve years as a cable puller, a car washer and a truck driver. He returned to Mobile and worked driving a fork truck and painting before he was hired by Employer in 1999 as a first-class painter. Claimant stated that none of his employment required him to take a written test, read blueprints or diagrams,

complete reports, type or use a keyboard, accept money or make change. He does not know how to type, use a computer, a cash register or a ten-key calculator.

Claimant was injured in the course of his employment when he suffered a fall, injuring his right leg. He underwent ten surgeries, the most recent in September 2004. Claimant continues to have problems with his leg, stating that it is difficult to walk and sometimes feels as if he is “walking on nails.” Tr. 36.

Claimant has a rod in his right leg. He reported having pain in his leg every day, which is worse when he sits a great deal. He does not need assistance in walking, but uses a cane daily. He wears a brace that extends to his knee and requires a special shoe. Elevation lessens his pain because it alleviates swelling in his ankle. He elevates his leg three times per day. Claimant takes daily antibiotics to control an infection he developed after surgery, and also takes Lortab at least twice a day and Zanaflex, a muscle relaxer. His medications make him “drowsy and woozy.” Tr. 50.

Claimant said that his treating physician, Dr. Rutlege, told him he cannot return to work at the shipyard and is only capable of sedentary work. He was not aware of any jobs he could perform within the restrictions Dr. Rutlege placed on him. Claimant was assigned a vocational consultant through the Department of Labor who told him he should obtain a GED. Claimant testified that he enrolled in a class at Carver State,⁴ but the instructor told him after six weeks that he was too far behind. He began one-on-one classes one night per week, and intends to continue working on obtaining a GED.

Claimant recalled vocational rehabilitation counselor Nancy Favaloro visiting his house, but stated that she did not contact him with information about potential employment. When he obtained the list of potential employers Ms. Favaloro identified from his attorney, he contacted each employer. Claimant said that Twin City Security told him that they were only hiring experienced security guards. Oral Arts of Mobile, identified as having a dental lab technician position, informed Claimant that it was not taking applications. Morrison’s Cafeteria was not currently hiring. Claimant took an application home where his daughter helped him complete it and submitted it to Morrison’s. He did not contact Apcoa regarding a parking lot cashier job because he did not have transportation.

⁴ Claimant explained that “Carver State” and “Bishop State” are the same; Carver is a campus of Bishop State Community College. Tr. 93.

On cross-examination, Claimant testified that he has an Alabama driver's license but he was not required to pass an examination to receive it, as he was waived in with an Illinois license, which was permitted because he had a Virginia license. He conceded that he passed a written test to obtain the Virginia license. Claimant stated that while in Chicago, he trained as a truck driver through Chicago Chauffeurs School, which consisted of a four week class and six weeks of home study, but he did not complete the program. Claimant received promotions while employed by Bernard Welding, and received evaluations describing his work as "outstanding." Tr. 69. While Claimant was identifying documents at the hearing, he used reading glasses and explained that he does so because he cannot see well. Tr. 69.

Claimant clarified the visit he received from Ms. Favaloro, and stated that Ms. Favaloro did not tell him that she was going to look for jobs for him. He denied telling Ms. Favaloro that he did not want a job or that he did not want her help. Trying to obtain his GED, Claimant stated he went to Carver State approximately one year prior to the hearing. He switched to one-on-one learning at Goodwill Industries around March 2004. Claimant testified that he had no response to the application he submitted at Morrison's Cafeteria. He has not applied for any other jobs.

On redirect, Claimant testified that the handwriting on a form entitled "Transfer/Interview," located at Employer's Exhibit 4, p. 66 was not his. He acknowledged that he wrote the letter of resignation to Bernard Welding found at Employer's Exhibit 4, p. 19, but said he had a friend help him spell the words. Tr. 91.⁵

Medical Evidence⁶

Chris E. Wiggins, M.D.

Dr. Wiggins' records indicate that he saw Claimant on September 26, 2000, the date of his accident, and treated him until December 4, 2000. CX 9. Claimant had major ankle reconstruction, and Dr. Wiggins' diagnosis was closed comminuted right tibial pilon and distal fibula fracture, and closed fracture left calcaneus. CX 9, p.6. Dr. Wiggins prescribed Lortab and home health care for Claimant. CX 9, p.10.

⁵ The resignation letter states in its entirety: "7/30/98 I resign personal reason," and bears Claimant's signature as he testified that he wrote the letter. EX 4, p. 19.

⁶ Because the parties have stipulated to Claimant's accident and resulting injury, the medical evidence submitted will be only briefly addressed.

Singing River Hospital

Records from Singing River Hospital indicate that Claimant was taken there after his work-related accident, and Dr. Wiggins performed a closed reduction on Claimant's left calcaneal fracture. CX 10.

Industrial Wellness Rehabilitation

Claimant underwent an initial physical therapy evaluation on December 15, 2000; the evaluator opined that Claimant would benefit from physical therapy with regard to pain reduction, increased muscle strength and ambulation. Claimant was to engage in physical therapy three times per week for four weeks. CX 11, p. 3. The next note, dated December 20, 2000, indicates that Claimant had received three treatments. CX 11, p.4.

Guy L. Rutledge, M.D.

Dr. Rutledge assumed Claimant's care on December 22, 2000. CX 12, p. 2. Between December 22, 2000 and September 11, 2002, Claimant underwent six surgical procedures.⁷ On April 11, 2003, Dr. Rutledge opined that the time was appropriate to move forward with vocational training, and determined that Claimant needed a job which entailed predominantly sitting and perhaps ten percent standing, with no squatting, stooping, climbing, or working at heights. CX 12, p. 23.

On May 23, 2003, Dr. Rutledge placed Claimant at maximum medical improvement and opined that Claimant needed to "find a sit down job with no squatting, stooping, climbing, working at heights, and no pedal use on the right. He can be retrained within these restrictions." CX 12, p. 23. On June 15, 2004, Dr. Rutledge stated that Claimant had been cleared for some light work jobs and Dr. Rutledge told Claimant he could "proceed with this either with or without his brace." CX 12, p. 29.

William A. Crotwell, M.D.

A record authored by Dr. Crotwell dated January 30, 2002 indicates that he reviewed Claimant's records and diagnostic tests. CX 14, p.1. Dr. Crotwell's impression was severe pylon fracture of the right ankle distal tibia and fibula with multiple operative procedures, and non union of multiple comminuted fragments of the distal tibia. He opined that the multiple procedures Claimant had undergone

⁷ CX 12 and CX 13 contain records detailing Claimant's numerous surgical procedures.

had failed, and the only available recourse was to remove all Claimant's hardware. He recommended a bone graft, and "totally agreed" with Dr. Rutledge's plan.

Patrick E. Nolan, M.D.

Dr. Nolan's records begin on September 10, 2002 and indicate that he treated Claimant for chronic osteomyelitis. CX 15, p. 3. Dr. Nolan prescribed Zosyn and Levaquin. The Zosyn was discontinued, but Dr. Nolan opined that Claimant may require chronic Levaquin indefinitely "for a life long infection." CX 15, p. 5.

John W. Davis, Ph.D.

Dr. Davis conducted a psychological evaluation of Claimant at the request of Sue Berthaume on July 15, 2003, wherein he administered the WAIS-III, WRAT-3, and Career Assessment Inventory (CAI). CX 18, p. 1. Dr. Davis stated that Claimant obtained a full scale IQ of 78 WAIS-III which placed his overall level of functioning in the "borderline range of intelligence." CX 18, p. 3. The WRAT-3 indicated that Claimant is "functionally illiterate," and that his reading skills are on a second grade level, his spelling is on a first grade level, and his arithmetic is on a sixth grade level. Dr. Davis did not include copies of the tests or explanations of the findings.

The CAI revealed that Claimant scored highest on the "realistic theme," which, according to Dr. Davis, indicates that Claimant's interests are similar to "people who like to build or repair things." CX 18, p. 3. An example of occupations in this category includes mechanics, skilled tradespeople, forester, and farmer. Dr. Davis opined that Claimant's education and intellectual capacity would eliminate some of the occupations. Claimant scored second highest in the "social area," indicating he has a "strong concern for others and likes to help others with their problems." Dr. Davis noted that again, Claimant's education and intellectual level would be a factor in his employment in this area. A copy of the CAI is included with Dr. Davis' records.

Vocational Evidence

Testimony of Thomas J. Stewart, M.S., C.R.C.

Mr. Stewart is a vocational rehabilitation counselor who met with Claimant on referral from Claimant's attorney on December 13, 2004. Tr. 98. Prior to meeting with Claimant, Mr. Stewart reviewed vocational reports, medical reports, a psychological evaluation, past employment information, and records of potential

employment identified by Ms. Favaloro. Mr. Stewart's vocational rehabilitation evaluation is located at Claimant's Exhibit 19.

Mr. Stewart testified that in his professional opinion, Claimant is unemployable in the competitive labor market due to of his age, education, functional illiteracy, work history, lack of usable transferable sedentary work skills, and permanent physical restrictions. Tr. 107-108. Mr. Stewart believed that the two major factors impeding Claimant's ability to work were his functional illiteracy and his severely limited ambulation abilities. He stated in thirty years of working in the vocational rehabilitation field, he had not had success finding sedentary work for an individual who did not possess literacy skills.

Mr. Stewart discussed the jobs identified by Ms. Favaloro. He stated that the unarmed security guard position at Twin City Security was unsuitable because it was classified as the "light" physical demand level, and because, in his experience, employers such as Twin City prefer to hire "someone with experience," though "they do hire untrained people and will train them...but they usually have to have a higher level of functioning in the last three to four years." Tr. 116. He also noted that the position required higher educational levels of functioning than those possessed by Claimant.⁸ In Mr. Stewart's experience, workers hired by security companies "have to do incident reports many times," which he determined would be problematic for Claimant. Tr. 115.

Regarding the dental lab technician position at Oral Arts, Mr. Stewart testified that the job was "completely out of order" because, according to the Dictionary of Occupational Titles, the position was carried a Specific Vocational Preparation (SVP) level of seven, meaning that it required training or prior experience of between two and four years for a worker to be eligible to perform the work.⁹ He said that a dental lab technician required higher levels of functioning

⁸ Here, Mr. Stewart referred to General Education Development (GED), which involves three major factors: reasoning, mathematics and language. These worker traits are associated with all 12,741 jobs in the Dictionary of Occupational Titles. Therefore, if a job is coded as "3-1-2," it calls for reasoning level three, mathematics level one and language level two. These numbers are in turn assigned specific definitions. For example, a reasoning level of three, according to the Dictionary of Occupational Titles, "is the ability to apply common sense and understanding to carry out instructions furnished in written, oral, or diagrammatic form." Tr. 113.

⁹ Mr. Stewart explained Specific Vocational Preparation (SVP) levels, stating that a position's SVP is the amount of time required by a typical worker to learn the techniques, required information, and to develop "a facility" needed for average performance in a specific worker's situation. There are nine SVP levels, with one and two being unskilled. The training that is necessary to perform the position could be on the job training, formal training, or experience in other jobs. Tr. 111-112.

than the security guard position. Also, Mr. Stewart discussed a letter from Mr. Leslie Thompson, General Manager of Oral Arts to Claimant's attorney in response to a subpoena asking for information about job openings.¹⁰ The letter is dated July 20, 2004 and states that Oral Arts had not advertised any positions for three years, that applicants must speak and read English to be eligible for employment, "high school or GED" is required, and the only position open in 2004 was for a delivery driver in April and was filled by a prior employee. CX 20, p. 3. Mr. Stewart stated that these requirements would not have been met by Claimant.

Mr. Stewart discussed the parking cashier position at APCOA. He attempted in vein to contact the company twice, so he researched the position in the Dictionary of Occupational Titles and determined that even this position requires basic literacy skills, because Claimant would need to be able to read and comprehend memos and schedules. He noted that Ms. Favaloro's description stated that Claimant may have had to occasionally drive a golf cart, and explained that under the Dictionary of Occupational Titles "occasional" means up to one-third of a workday. Tr. 120. Mr. Stewart noted Dr. Rutledge's restriction against pedal use, but said that since Claimant occasionally drove a car for short distances, he believed Claimant to be capable of driving a golf cart on "a rare occasion." Tr. 120.

Finally, Mr. Stewart addressed the checker position at Morrison's Cafeteria. He visited the cafeteria and made several observations, including that there was no stool or chair at the area where food is checked out. He spoke with a cashier who told him they never sit down and no chairs or stools were allowed in the area. Tr. 121. Mr. Stewart said that during less busy times the workers might help in the kitchen, clean or sweep, which necessarily involves walking and carrying.

Mr. Stewart testified that Piccadilly Cafeteria now owns Morrison's Cafeteria. He discussed the letter received by Claimant's attorney from Piccadilly in response to a subpoena which included a job description for the food checker position. CX 21, p. 4. Mr. Stewart opined that the position at Morrison's was not suitable for Claimant because he would be required to perform reading and comprehension, including reviewing the menu daily and "reviewing codes associated with menu items." Tr. 124. Claimant would also have to "accurately

¹⁰ Claimant's counsel subpoenaed all the employers identified in Ms. Favaloro's report, except APCOA, requesting "Any and all documentation regarding availability" of the position identified by Ms. Favaloro "during 2004, including but not limited to all documents reflecting the job description of the position, copies of advertisements of the position, any and all physical and language requirements, hourly salary or wage offered" and other information. CX 20, 21, 22.

and quickly” type item codes into the point of sale system. He noted that the position required the worker to provide assistance in the dining room or counter when assigned to do so by a manager and would maintain the drink stand and checking station during the slow part of the day. Mr. Stewart stated that the basic skills required for the job, including basic knowledge of typing and use of a ten-key adding machine, and the ability to use a point of sale system, were unsuitable given Claimant’s functional illiteracy. He also noted that the physical demands of the position, including the ability to stand for “long periods of time up to four hours” and required bending and stooping, rendered the position unsuitable for Claimant. Tr. 125.

On cross-examination, Mr. Stewart acknowledged that Claimant earned probably two promotions in the Navy, took an appeal from a worker’s compensation case without an attorney, and that the records from Bernard Welding indicate that he was consistently promoted with no negative remarks contained in the record. Mr. Stewart agreed that an average IQ score is 100 and a score of 78 falls directly between “borderline” and “low-average” categories. Tr. 137.

Mr. Stewart opined that Claimant is not currently motivated to find work, due to a “combination of factors.” Tr. 150. While Mr. Stewart agreed that Dr. Rutledge approved the jobs identified by Ms. Favaloro, he stated that he did not know whether Dr. Rutledge was aware that Claimant was functionally illiterate, because, he explained, Dr. Rutledge deals with “strictly orthopedic functional limitations.” Tr. 154. Mr. Stewart agreed that Dr. Rutledge approved the jobs identified by Ms. Favaloro even though he had prescribed the medication which Claimant stated made him “woozy.” Tr. 163.

Mr. Stewart conceded that the WRAT-3 test administered by Dr. Davis was performed alone, without another test to corroborate or validate the results. He stated that there are two versions of the WRAT-3 and only one was administered to Claimant. He said that the WRAT -3 is typically used to make a determination regarding functional illiteracy, but when asked if one test administered one time was enough to make a diagnosis of illiteracy, he stated “I’d like to see another test given.” Tr. 156. On redirect, Mr. Stewart testified that nothing he heard at the hearing changed his opinion that Claimant is unemployable.

Testimony of Nancy T. Favaloro, M.S., C.R.C.

Ms. Nancy Favaloro, a licensed vocational rehabilitation counselor, initially met Claimant at his home on November 17, 2003, on referral from Carrier. Tr. 171. At that meeting, Ms. Favaloro conducted an interview; however, when she

attempted to administer vocational tests to Claimant he informed her that he had already taken them. Ms. Favaloro later realized that the tests Claimant had taken were different from those she wanted to administer. Tr. 171.

From her interview with Claimant, Ms. Favaloro learned that he lived in Mobile with his fiancée, had been in the Navy for three years, had a drivers license, and worked as a “skilled painter and lead person” for Employer. Ms. Favaloro testified that Claimant informed her that as a lead person, he supervised workers on occasion and “had to keep up with man-hours.” Tr. 172. Ms. Favaloro spoke with Ricky Parker in the operations sector of Employer’s business who confirmed what Claimant told her, that Claimant would “keep up with man-hour reports” including how many men were needed to fill a job order, the men assigned to the job, and the number of hours required to complete the job. Ms. Favaloro clarified that in the initial interview, Claimant told her that “he was a steel painter and a lead person...he did that work on occasion, but that he did keep up with the man-hours.” Tr. 173.

During the interview, Claimant also told Ms. Favaloro that he worked in assembly for Bernard Welding and operated various machines. He did some machinist-type work but did not work on the computer machine. He said he performed work which followed diagrams. Claimant said he completed a truck driving class. He received two promotions in the Navy, which Ms. Favaloro noted because an important point in the vocational field is the “ability to be promoted and learn new tasks.” Tr. 176. Ms. Favaloro reviewed Claimant’s personnel file from Bernard Welding and noted that there was no criticism of his performance; she said that in twenty-four years in the vocational field she had not seen a twelve or thirteen year employment history without negative comments. The records from Bernard Welding establish that Claimant, in the words of Ms. Favaloro, “moved into various positions and then went into a lead person-type position” called “group leader.” Tr. 177.

Claimant told Ms. Favaloro during their interview that he was going to begin the GED program at Bishop State Community College. Ms. Favaloro contacted Bishop State on November 1, 2004. Molita Woods, in the admissions department checked Claimant’s name and social security number in the computer system and informed Ms. Favaloro that Claimant “was not in the system.” Tr. 178. Ms. Woods told Ms. Favaloro that Carver Campus is part of the Bishop State system, but she was on the main computer system and if Claimant was enrolled at any campus, the computer would have so indicated.

Ms. Favaloro testified that she offered to assist Claimant in finding employment, to which he responded that he was going to take GED classes and “upgrade his skills.” Ms. Favaloro had not seen any test results regarding Claimant’s educational skills at that time, but he told her that “he could read and write a little bit.” Tr. 179. Ms. Favaloro proceeded to look into sedentary jobs which did not require meaningful reading and writing skills. She telephoned Claimant on January 6, 2004 and explained the potential employment which she had located. Ms. Favaloro said that Claimant told her he didn’t “want no security or any other job”¹¹ that she located. Tr. 180. She said that Claimant told her if Employer did not want him back he would rather “get this over with” and wanted to “settle [his] case.” Tr. 180. Ms. Favaloro said she assumed that the case would be settled, and she had no further contact with Claimant. Tr. 181.

After her interview and upon review of Dr. Rutledge’s and Ms. Berthaume’s reports, (CX 2, p. 12), Ms. Favaloro identified four potential jobs in her report dated January 12, 2004. Ms. Favaloro indicated that the positions were entry-level jobs where on-the-job- training was provided, and all were located in the Mobile, Alabama area. The positions included:

- (1) Unarmed Security Guard at Twin City Security. This position provided unarmed security services to businesses, and there were posts available where the worker sits at a gate and performs only minimal walking and check for proper identification. Required lifting is less than twenty pounds, and wages for someone with no experience were \$5.50 at entry level. Ms. Favaloro stated that the company was aware of Claimant’s inability to perform meaningful reading and indicated that assistance would be provided if Claimant had to complete any reports. Reports were only required and completed if an incident occurred.
- (2) Dental Lab Worker at Oral Arts. This position provided on-the-job training to enable workers to learn how to mix plaster and make models from impressions. Employees used small tools such as handheld cutters and grinders to trim the models. The work could be performed while seated in a stool because the work was done at bench level. The employee could stand or walk as needed. Lifting was less than ten pounds, and the position paid \$6.00 per hour at entry level.
- (3) Parking Cashier at APCOA. On-the-job training was provided to a worker who would learn to accept parking tickets and payments from customers. Training was also provided to learn how to use a system that calculated the

¹¹ Ms. Favaloro testified that this was a verbatim quote.

amount owed by customers as well as the amount of change due to customers. Worker could sit frequently throughout the workday and could alternate standing and walking as needed. The worker would need to be able reach with one upper extremity to handle parking tickets and accept payments. Lifting was ten to fifteen pounds; wages were \$5.50 to \$6.50 per hour.

- (4) Checker at Morrison's Cafeteria. On-the-job training was provided. Worker could sit at the end of the serving line where he would enter items purchased by customer. This is not a cashier position; rather, the worker would be trained to enter food items by the push of a button. Entailed entry-level repetitive tasks where the worker could alternately sit, stand and walk, though the majority of the time the worker would sit on a stool. Lifting was less than fifteen pounds, and wages were \$6.50 per hour. CX 2, p. 5.

Ms. Favaloro discussed the potential employment identified in her January 7, 2004 report, as well as the opinions expressed about the jobs by Mr. Stewart. Regarding the security guard position, Ms. Favaloro testified that she looked into this position because she was necessarily limited by Claimant's inability to perform meaningful reading and writing and sedentary physical restrictions. She stated that Twin City offers jobs that require walking, but she specifically asked about a gate guard job because it would comply with sedentary physical restrictions.

Ms. Favaloro said that Ms. Berthaume with the Department of Labor would not release Claimant's test scores, but that Deborah Murphy with the Department of Labor told Ms. Favaloro that Claimant's skills were poor, so Ms. Favaloro proceeded under the assumption that Claimant could not perform meaningful reading and writing, but could read and comprehend only simple words and phrases. All of the identified employers were told of Claimant's past work history, that he did not complete high school, and that he required a sedentary position where he could not perform ambulatory activities more than ten percent of the time. Tr. 182-183.

Ms. Favaloro discussed the checker position at Morrison's Cafeteria. She was not aware that workers were not allowed to sit down until July 2004 when the company responded to Claimant's subpoena. Ms. Favaloro said that while Morrison's will not allow a worker to sit down and perform the job, Piccadilly Cafeteria, which is the parent company and has a site across the street from Morrison's, will allow someone to perform work seated at the manager's discretion. Ms. Favaloro learned this information from Sally Schaeffer, a risk

manager for Piccadilly's headquarters in Baton Rouge. Tr. 184. Ms. Favaloro stated that many employers will allow a worker to sit if it is a reasonable accommodation pursuant to the Americans with Disabilities Act.

Ms. Favaloro said that Twin City Security was aware of Claimant's poor reading and writing skills. She spoke with Chief Lloyd Wrightstone at Twin City Security, and told him that Claimant was not able to read and write and therefore probably could not complete reports. She said that Chief Wrightstone said that was acceptable, and that if an incident occurred, Claimant would make a telephone call to report it and if a written report was required Claimant could tell someone in the company. Therefore, Ms. Favaloro testified that Claimant's limited literacy skills would not be an impediment to his employment with this company. Tr. 187. Ms. Favaloro also reviewed the information furnished by Chief Wrightstone to Claimant's counsel in response to a subpoena and stated that the requirements he enumerated in the response were the same as those he told Ms. Favaloro on the telephone. She said that Chief Wrightstone indicated that in 2004, the company had forty-five applicants for twenty-one job openings. She said that she had not seen anything which indicated that Twin City only hired applicants with experience, as testified to by Claimant, rather, she noted newspaper advertisements placed by Twin City which stated "we'll train." Tr. 190.

Ms. Favaloro addressed Mr. Stewart's criticism that the security guard position required a greater GED level than Claimant possessed. She explained that the Dictionary of Occupational Titles does not differentiate between armed and unarmed security guard positions, or the jobs which require walking and standing versus seated positions. She said that Claimant's past work as a painter in a shipyard carries the GED level of 3-2-2, and an unarmed security guard position is classified as 3-1-2; which indicates that the unarmed security guard position requires equal or less ability than Claimant's previous work. Tr. 193.

Regarding the dental lab technician position, Ms. Favaloro clarified that the position she located was not the skilled dental lab worker position found in the Dictionary of Occupational Titles (which carried a GED of 4-4-3); rather, it was "an unskilled, entry-level, almost minimum-wage job." Tr. 193. Ms. Favaloro opined that in Claimant's past work history, his highest skill level was seven, or semi-skilled, and his highest GED was 4-3-3 in order or reasoning, math and language. Therefore, Ms. Favaloro concluded that ideally, Claimant was capable of performing work that was less than an SVP of seven and a GED of less than 4-3-3. However, Ms. Favaloro conducts a labor market survey wherein she speaks

with potential employers in order to ascertain whether Claimant is intellectually capable of performing a certain job. Tr. 194.

Ms. Favaloro spoke with representatives at all four of the employers she identified as having potential employment for Claimant. When she spoke with Oral Arts regarding the dental lab position and explained that Claimant had poor reading skills, they were not deterred and said they would consider someone with his profile because Ms. Favaloro had also told them about Claimant's previous work experience. She told Oral Arts that Claimant required a position where he would be seated throughout the day and could not walk more than ten percent of a workday, and said that Oral Arts said Claimant could sit down and do the job.¹²

Ms. Favaloro explained that the information which was sent to Claimant's counsel in response to a subpoena did not adequately reflect the position she located for Claimant at their company. Ms. Favaloro noted that the letter stated that an applicant must read and speak English, but believed that this was the "ideal person that they look for." She explained that Oral Arts does not typically advertise for the position she located because she contacts them and has worked with them in the past. She asked Mr. Thompson, the author of the letter to Claimant's counsel, about the wages listed of \$8.00 per hour, and explained that he said the applicant had previous experience and was paid a higher rate than the \$6.00 per hour that was quoted to Ms. Favaloro for an applicant without experience. Ms. Favaloro said that Mr. Thompson said he would like to have applicants who graduated from high school, but given the jobs Claimant has held in the past, "he would certainly consider" an applicant like Claimant. Tr. 197. Ms. Favaloro addressed Mr. Thompson's statement that the only position available at Oral Arts in 2004 was for a delivery driver. She said that she contacted Oral Arts in December 2003 and Claimant's subpoena asked for information relating to 2004. Mr. Thompson told Ms. Favaloro that he hired a dental lab technician on February 1, 2005. To the best of Ms. Favaloro's knowledge, Claimant did not submit an application for the job at Oral Arts.

Regarding the position at Morrison's Cafeteria, Ms. Favaloro opined that Claimant could be trained to perform the checker position despite his literacy problems. She explained the "point of sale system," stating that the menu items, i.e. entrée, vegetable, coffee, dessert, etc., are gone over with workers each morning and assigned a numbered key which the worker must press to correlate

¹² Ms. Favaloro stated that the response to her statement regarding Claimant's sedentary restriction was that the workers at Oral Arts "don't make teeth with their feet." Tr. 199.

with the item. Ms. Favaloro believed that after being a skilled painter, operating a machine, and being promoted, that Claimant “could be trained to figure out what corn, peas, fried chicken would be,” and so did the people she spoke with at Morrison’s. Tr. 200. Ms. Favaloro reiterated that checker and cashier are separate positions, though the workers frequently alternate positions. She said that Piccadilly told her that if someone had a note from a doctor indicating that he had to sit down he would be allowed to do so.

Ms. Favaloro asked Ms. Schaeffer, Piccadilly’s risk manager, about the item on the job description requiring workers to maintain the drink stand. She explained that if a worker was being accommodated, he could get up and look at the drink stand which is very close to the worker’s station, to see whether anything needed to be filled and call an attendant to do so. Therefore, Claimant would not be the worker performing hands-on maintenance, but would alert others that maintenance needed to be performed. Tr. 202. Ms. Favaloro clarified that Claimant would only use a ten-key adding machine if he was a cashier, not in the checker position she identified for him. Tr. 203. She said that Piccadilly told her that if Claimant had a doctor’s note and was accommodated, the requirement of standing of up to four hours would not apply to him. Ms. Favaloro said that Morrison’s Cafeteria will no longer consider an applicant like Claimant after July 2004 when Ms. Favaloro re-contacted them, however, Piccadilly will, because even though the two businesses are owned by the same company, hiring is at the manager’s discretion. Tr. 204.

Ms. Favaloro stated that when she interviewed Claimant, she did not detect that he had any difficulty understanding questions she asked him, nor did she have trouble understanding his responses. She opined that Claimant’s communication skills are adequate for the positions she identified. In reviewing Claimant’s work history, Ms. Favaloro did not find any point where Claimant did not begin a job at entry-level and thereafter was promoted. She explained that Claimant is a good worker, does what he is told to do, maintains persistence and pace at work and is obviously able to follow instructions. She said Claimant is capable of learning new tasks, and seems to have adapted. The four jobs she identified are representative of similar jobs in the Mobile area.¹³ Ms. Favaloro opined that suitable employment within Claimant’s restrictions currently exists, and there has not been a time when it did not exist.

¹³ The parking lot attendant position with APCOA, aside from the information contained in Ms. Favaloro’s report, was not testified about in greater detail at the hearing.

On cross-examination, Ms. Favaloro stated that she did not think she had asked employers if there was a limit on the types of accommodations they were willing to provide for Claimant. She said that her report was dated January 7, 2004, and she called Claimant on January 6, 2004. She agreed that there was nothing in the record indicating that she identified the jobs prior to January 1, 2004, but said that the jobs would have had to be identified before she dictated a report, so the jobs were identified “within several weeks prior” to the date of the report. Ms. Favaloro clarified that when she contacted Bishop State, the admissions office was informed of the type of classes that Claimant would have been enrolled in, but agreed that she probably did “not say exactly” that Claimant was in preparation of GED courses. She agreed that Claimant did not have any prior security guard experience, that he did not have any knowledge of typing or use of a ten-key machine, and that standing for periods of up to four hours would be a contraindication of Dr. Rutledge’s restrictions.

Sue N. Berthaume, M.S., L.P.C., C.R.C.

Ms. Berthaume is a vocational rehabilitation counselor to whom Claimant was referred by the Department of Labor on November 6, 2001. CX 17, p. 3. Ms. Berthaume conducted the initial vocational interview on December 21, 2001, but determined that because of Claimant’s impending surgery on February 4, 2002, development of his case could not proceed at that time. CX 17, p. 7. Ms. Berthaume contacted Claimant several times after his surgery, though she took no action in his case because he had not been released to return to work.

Ms. Berthaume met with Claimant on June 2, 2003 and received Dr. Rutledge’s restrictions. CX 17, p. 16. She noted that Claimant was possibly interested in retraining and/or work in a field utilizing his prior skills. Ms. Berthaume investigated adult basic education classes for Claimant “to help improve his skills and help him obtain his GED.” CX 17, p. 20. She arranged a GED evaluation for Claimant at Bishop State Community College. On December 10, 2003, Ms. Berthaume’s notes indicate that she spoke to Claimant and he was attending classes at Bishop State, Carver Campus, but had been ill with the flu. On January 23, 2004, Ms. Berthaume noted that Claimant had not yet returned to classes.

On February 23, 2004, Ms. Berthaume learned in a conversation with Claimant that he would return to adult basic education classes on March 1, however, on April 6, 2004, Claimant’s attorney told Ms. Berthaume that Claimant’s car had broken down and he had no transportation to class. Ms. Berthaume learned from the college that night classes were available. On June 4,

2004, Claimant told Ms. Berthaume that he was taking adult basic education classes at Goodwill Industries two nights per week where he received individual attention. CX 17, p. 31.

Ms. Berthaume met with Claimant on August 5, 2004 where she helped him complete a resume. Claimant reported that he contacted potential employers identified by Carrier, but either no positions were available or experience was required. Ms. Berthaume indicated that she searched for jobs for Claimant at University of South Alabama, but there were none available within Claimant's restrictions, nor were cashier or security guard positions she found through local businesses. Ms. Berthaume's plan was to continue job placement activities, and she listed continued feasibility for success as "good." CX 17, p. 34.

Other Evidence

Claimant's wage records from Employer supporting the stipulated average weekly wage are located at Claimant's Exhibit 8. Claimant's Social Security statement of earnings for the years 1996-2000 is located at Claimant's Exhibit 7. A statement indicating payments made by Carrier totaling \$255,717.28, including compensation and medical expenses is located at Claimant's Exhibit 24.

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in *Director, OWCP v. Greenwich Collieries (Maher Terminals)*, 512 U.S. 267, 28 BRBS 43 (1994), that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, violates Section 556(d) of the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (1994).

Causation

Section 20(a) of the Act provides a claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm, and that employment conditions existed which could have caused, aggravated, or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Building Co.*, 23 BRBS 191 (1990). The Section 20(a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984). In this case, Claimant and Employer have stipulated that Claimant suffered a work related injury on September 25, 2000. I accept the parties' stipulation. The nature and extent of Claimant's injury, however, is at issue.

Nature and Extent

Having established an injury, the burden now rests with Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Constr. Co.*, 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *Id.* at 60. Any disability before reaching MMI would thus be temporary in nature.

The date of maximum medical improvement (MMI) is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition has become permanent is primarily a medical determination. *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *La. Ins. Guaranty Ass'n v. Abott*, 40 F.3d 122, 29 BRBS 22 (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. Gen. Dynamics Corp.*, 10 BRBS 915 (1979). The parties have stipulated that Claimant reached maximum medical improvement on May 23, 2003. Based on Dr. Rutledge's records, I accept the parties' stipulated MMI date.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). A claimant who shows he is unable to return to his former employment due to his work related injury establishes a *prima facie* case of disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P & M Crane Co. v. Hayes*, 930

F.2d 424, 420, 24 BRBS 116 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. Gen. dynamics Corp.*, 25 BRBS 128 (1991). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. *Southern v. Farmer's Export Co.*, 17 BRBS 24 (1985). Issues relating to nature and extent do not benefit from the Section 20(a) presumption. The burden is upon Claimant to demonstrate continuing disability, whether temporary or permanent, as a result of his accident.

If an injury occurs to a body part specified in the statutory schedule, then the injured employee is limited to the permanent partial disability schedule of payment contained in Sections 908(c)(1) through (20). The rule that the scheduled benefits are exclusive in cases where the scheduled injury, limited in effect to the injured part of the body, results in a permanent partial disability, was thoroughly discussed by the United States Supreme Court in *Potomac Electric Power Co. v. Director, OWCP*, 101 S.Ct. 509 (1980) (hereinafter *PEPCO*). However, a scheduled injury can give rise to permanent total disability pursuant to Section 908(a) in an instance where the facts show that the injury prevents a claimant from engaging in the only employment for which he is qualified. *PEPCO*, 101 S.Ct. at 514 n.17. Therefore, if Claimant establishes that he is totally disabled, the schedule becomes irrelevant. *Dugger v. Jacksonville Shipyards*, 8 BRBS 552 (1978) *aff'd* 587 F.2d 197 (5th Cir. 1979).

In this instance, the parties have stipulated, and I find, that Claimant has a thirty percent impairment of the lower right extremity. There can be little doubt that Claimant has shown he cannot return to his usual employment as a first-class painter, as evidenced by the sedentary restrictions imposed upon him by Dr. Rutledge, his treating physician. Because Claimant has established that he is unable to return to his usual employment, Employer must demonstrate the availability of suitable alternative employment.

To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the claimant's geographical area which he is capable of performing, considering his age, education, work experience and physical restrictions, for which the claimant is able to compete and could likely secure if he diligently tried. *New Orleans (Gulfwide)*

Stevedores v. Turner, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981).

Turner does not require that the employer find specific jobs for the claimant or act as an employment agency for the claimant; rather, the employer may simply demonstrate the availability of general job openings in certain fields in the surrounding community. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 431 (5th Cir. 1991); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 1044 (5th Cir. 1992). However, for job opportunities to be realistic, the employer must establish the precise nature and terms of job opportunities which it contends constitute suitable alternative employment. *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. *Villasenor v. Marine Maint. Indus., Inc.*, 17 BRBS 99, 103 (1985). Once the employer demonstrates the existence of suitable alternative employment, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. *P & M Crane Co.*, 930 F.2d at 430.

In the present case, Claimant contends that none of the positions identified by Ms. Favaloro constitute suitable alternative employment. Claimant relies on Mr. Stewart's opinion that Claimant is unemployable due to a combination of factors, especially his functional illiteracy combined with sedentary work restrictions. Claimant asserts that the positions identified by Ms. Favaloro are not realistically available to him and would require him to exceed both his physical restrictions and the vocational skills he possesses. Therefore, it is Claimant's position that he has been and continues to be permanently totally disabled.

Employer, on the other hand, contends that all of the positions identified by Ms. Favaloro's report constitute suitable alternative employment. Employer asserts that Claimant is capable of performing such jobs as evidenced by his lengthy work history and consistent course of promotions at various jobs he has held. As a result, Employer argues that because suitable alternative employment has been established and Claimant did not make a diligent attempt to secure employment, Claimant is only permanently partially disabled and therefore is relegated to scheduled payments pursuant to *PEPCO*.

I agree with Employer, and I find that it has demonstrated the existence of suitable alternative employment. Claimant's argument that he is unemployable in

essence boils down to two factors: his functional illiteracy and his physical restrictions. I do not find either to merit rendering him completely incapable of performing meaningful employment. Claimant's argument that he is functionally illiterate is based on the results of one test administered by Dr. Davis, who did not explain the results or testify at the hearing. Mr. Stewart, Claimant's vocational expert, conceded that he would like to have seen another test conducted to be more sure of the results of the initial test.

Claimant testified that he receives help reading from his children and cannot understand what he reads. While this may be true, it certainly has not prevented Claimant from succeeding in the past, as evidenced by his work history, promotions, and holding a driver's license. Claimant received promotions in the Navy, numerous promotions and commendations over twelve or thirteen years at Bernard Welding, and successfully worked at Ingalls Shipyard and for Employer. It is apparent that Claimant is not only able to function in an employment setting, but also to succeed.

Granted, the fields in which Claimant has previously worked and excelled at are those involving trade skill and heavy labor. However, most of the jobs identified by Ms. Favaloro do not involve meaningful reading, as Ms. Favaloro testified she informed potential employers about Claimant's lack of reading skills. Ms. Favaloro also testified about the requirements of each job, for example, the food checker position which would require Claimant to recognize symbols, or the unarmed security gate guard position which would allow Claimant to have assistance in completing reports, if needed. In sum, I find that Claimant's years of work history outweigh the results of one test in determining whether Claimant is capable of performing employment.

Additionally, I find no merit in the argument that Claimant's physical restrictions render him unemployable. It is notable that Dr. Rutledge, who imposed the restrictions on Claimant, approved all of the potential jobs identified by Ms. Favaloro. Claimant argues that Mr. Stewart opined that if the jobs were "extensively outlined" by Ms. Favaloro in her report, Dr. Rutledge "may have" had a different opinion. However, the forms Dr. Rutledge received contained information about lifting requirements, how much sitting and standing would be required, the basic functions of each position, and even the fact that Claimant may occasionally have to drive a golf cart in the parking lot attendant position, nonetheless, he approved all of the positions. CX 4, pp. 7-8. While Mr. Stewart testified that Dr. Rutledge likely was not aware of Claimant's functional illiteracy

when he approved the jobs, the fact remains that Dr. Rutledge did approve the jobs as conforming with Claimant's physical restrictions.

Because I find Claimant capable of performing some type of employment, I must consider the requirements of each of the positions identified by Ms. Favaloro in order to determine if they conform with Claimant's physical restrictions, education, age, and work experience. Of the four potential positions identified as suitable alternative employment, I find that Claimant was physically capable of performing all of the positions, as evidenced by Dr. Rutledge approving the positions, as his treating physician who imposed Claimant's restrictions and prescribed the medication Claimant stated made him "woozy." Aside from having Dr. Rutledge's approval, Ms. Favaloro also stated that she informed every potential employer of Claimant's restrictions and need for mostly sedentary work, which the employers each stated they would accommodate.

Regarding whether the identified positions are suitable for Claimant on other non-physical levels, I find Claimant's work history to be most instructive. Claimant may be, as the WRAT-3 indicated, functionally illiterate, but he has been steadily and successfully employed for years. Claimant told Ms. Favaloro in their interview that he did not read or write well, and she accordingly searched for positions which did not require meaningful reading or writing. Despite Mr. Stewart's protest that the positions identified by Ms. Favaloro exceeded Claimant's educational skills, I believe that Ms. Favaloro, who actually spoke to all of the potential employers, explained what Claimant was capable of performing these jobs.

Mr. Stewart stated that Claimant would be unable to "review menu items" at Morrison's Cafeteria, but Ms. Favaloro explained that each day's menu is reviewed with workers so they know which code to associate with each item. At Oral Arts, workers mix plaster and use small tools to make models from impressions. It is difficult to believe that Claimant could not be trained how to perform these tasks given his work history of painting, truck driving, and machine and utility operating. The positions identified by Ms. Favaloro are entry-level, provide on the job training, and for the most part involve repetitive tasks. Ms. Favaloro testified that she identified the positions in late 2003, or "within several weeks" of issuing her report of January 7, 2004. Claimant argues that these positions were not available to him, but does not contradict Ms. Favaloro's testimony that positions were available at the time of her report. In addition, Ms. Favaloro testified that Oral Arts hired a dental lab worker as recently as February 2005. Accordingly, I find that Employer has identified suitable alternative employment.

Lastly, I do not find that Claimant engaged in a diligent attempt to obtain employment. He testified that he submitted only one application, to Morrison's, and did not follow up on the application. He has not applied for any other position identified by Ms. Favaloro nor has he sought employment on his own. Therefore, Employer has established the availability of suitable alternative employment and Claimant has not demonstrated he diligently tried to obtain employment, so Claimant's disability is permanent partial in nature. Pursuant to *PEPCO*, Claimant is relegated to the compensation schedule contained in Section 908(c)(1)-(20).

Section 14(e) penalties

Under Section 14(e) an employer is liable for an additional 10% of the amount of worker's compensation due where the employer does not pay compensation within 14 days of learning of the injury, or fails to timely file a notice of controversion within 14 days. 33 U.S.C. §914. In this instance, the parties agree any 14(e) penalties have been paid. Tr. 223.

ORDER¹⁴

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer/Carrier shall pay to Claimant compensation for permanent total disability from May 23, 2003, the date Claimant reached MMI, until January 12, 2004, the date suitable alternative employment was identified, based on an average weekly wage of \$742.45;

(2) Employer/Carrier shall pay to Claimant compensation for permanent partial disability benefits commencing January 12, 2004, the date suitable alternative employment was identified, for 86.4 weeks, for 30% impairment to his lower right extremity, based on an average weekly wage of \$742.45;¹⁵

(3) Employer/Carrier shall pay all reasonable and necessary medical expenses related to Claimant's September 25, 2000 injury;

¹⁴ At the conclusion of the hearing, the parties agreed that the only issue for my determination was nature and extent of Claimant's disability after reaching MMI, he otherwise received the compensation to which he felt entitled. Tr. 221-223.

¹⁵ 288 weeks for the loss of a leg pursuant to Section 908(c)(2) times 30% equals 86.4 weeks.

(4) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant;

(5) Employer/Carrier shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961;

(6) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have ten (10) days from receipt of the fee petition in which to file a response.

(7) All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

Entered this 26th day of April, 2005, at Metairie, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge

CRA:bbd